

The Honorable David G Estudillo

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION**

WILL CO. LTD. a limited liability company
organized under the laws of Japan,
Plaintiff,

Case No. 3:20-cv-05666-DGE

vs.

KAM KEUNG FUNG, aka 馮錦強, aka
FUNG KAM KEUNG, aka FUNG
KAMKEUNG, aka KUENG FUNG, aka
KEUNG KAM FUNG, aka KAM-KEUNG
FUNG, aka KEVIN FUNG, an individual;
FELLOW SHINE GROUP LIMITED, a
foreign company, and DOES 1-20, d/b/a
AVGLE.COM,

**DEFENDANTS' REPLY TO PLAINTIFF'S OBJECTIONS TO
REPORT AND RECOMMENDATION DKT. NO. 65**

Introduction

Plaintiff, a private Japanese limited liability company headquartered in Tokyo brought the present this action against a Chinese-born individual (who is a permanent resident of Hong Kong) and a foreign corporation based in the British Virgin Islands, concerning a website that is: managed out of Taiwan; supported by ads placed on the website by a Canadian ad broker (that was engaged from Hong Kong); hosted on servers located in the Netherlands; displaying user-generated videos with Japanese titles that are primarily in the Japanese language. Because Defendants (and Plaintiffs' claims) lack any relevant, continuing, or substantial connection to Washington or to the United States as a whole, Defendants moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(2).

On July 19, 2021, after a full briefing by the Parties, this Court found that Plaintiff had failed to make even a *prima facie* showing that the Court could exercise personal jurisdiction over Defendants consistent with the Constitution's due process requirements. *See* Docket No. 43. Nevertheless, finding that it was *plausible* that Plaintiff might be able meet its burden if provided with the opportunity to jurisdictional discovery, the Court deferred dismissing the action to afford Plaintiff the opportunity to take limited discovery that might bolster its jurisdictional claims.

Following the close of jurisdictional discovery, the Court received supplemental briefing from both parties. Far from bolstering its original case, however, Plaintiff's supplemental briefing made clear that – even having been afforded jurisdictional discovery – Plaintiff had failed to make any colorable claim that Defendants were subject to personal jurisdiction. And, on August 17, 2022, Magistrate Cristel issued his Report and Recommendation in which he held, *inter alia*, that:

After conducting jurisdictional discovery and filing a supplemental response, Plaintiff has still not shown the United States was “the focal point” of Avgle.com or of Defendants' conduct in creating and maintaining the site. ...Plaintiff has, therefore, not shown express aiming, and the Court lacks jurisdiction over Defendants.

Docket No. 65, p. 9.

On August 31, 2022, Plaintiff filed its Objections to the Magistrate's Report and Recommendation.

ARGUMENT

I. The Present Case is Not Factually “Identical” to the Ninth Circuit's Recent Decision in *Will Co., Ltd v. Ka Yeung Lee, et al.*

In its Objections, Plaintiff primarily points to a recent opinion from the Ninth Circuit in

1 *Will Co., Ltd v. Ka Yeung Lee, et al.* (“*Lee*”), 2022 U.S. App. LEXIS 24549 (9th Cir. 2022)¹ in
 2 which the Ninth Circuit reversed a dismissal for lack of personal jurisdiction, insisting that the
 3 facts of *this* case “are essentially identical to the facts” in *Lee*. This is simply not the case.

4 Preliminarily, it is worth noting that – unlike the case in *Lee* – Plaintiff here requested
 5 and was provided the opportunity to conduct jurisdictional discovery, which yielded no new
 6 facts with which to support a finding of personal jurisdiction. Courts within this circuit have
 7 recognized that, once a party has been afforded jurisdictional discovery, it should no longer be
 8 permitted to simply rely on the unsupported allegations of its complaint. *See, e.g., AMA*
 9 *Multimedia LLV v. Wanat*, 2017 U.S. Dist. LEXIS 228078, *8 (D. Az. 2017)(“it makes little
 10 sense to allow early discovery because jurisdictional facts are disputed if the court is then
 11 required to accept the plaintiff’s version of facts when assessing jurisdiction”).

12 Moreover (and despite the fact that Defendants disagree with the holding in *Lee* and
 13 believe that it conflicts with the Ninth Circuit’s holding in *AMA Multimedia LLV v. Wanat*, 970
 14 F.3d 1201 (9th Cir. 2020)), the facts of this case are not, in truth, “essentially identical to the
 15 facts” in *Lee*. Indeed, none of the factors that the Ninth Circuit found to be crucial to its finding
 16 of personal jurisdiction in *Lee* are present here.

17 First, in *Lee*, the Ninth Circuit found the defendants to be subject to personal jurisdiction
 18 – despite declaring the question a “close case” – in large part because the Defendants’ website
 19 was hosted on servers within the United States. *See, Lee* , pp. 15-17 (“Defendants chose to host
 20 the website in Utah... There are a few ways sites can make their pages load faster. For one, the
 21 site’s operators can choose to host their site on servers near their desired audience. The closer a
 22 viewer is located physically or geographically to the host server, the faster that page will load for
 23

24 ¹ Defendants in *Lee* have informed the Ninth Circuit of their intent to seek *en banc* review of the Court’s decision.

1 the viewer.”). Not only is that factual assertion absent in this case, it is undisputed that the
2 Defendants’ website is (and at all relevant times has been) hosted on servers located in the
3 Netherlands. *See* Declaration of Ming Chung, D.E. 23-3, p. 3, ¶13 (“The hosting company that
4 presently hosts the Avgle.com website is Novogara BV, which is located in Amsterdam,
5 Netherlands. Novogara BV has hosted Avgle.com since July 2018, and before that, another
6 company in the Netherlands was the hosting company for Avgle.com since Avgle.com
7 launched.”)

8 Next, in *Lee*, the Ninth Circuit credited Plaintiff’s allegation that the Defendants had
9 utilized a Content Delivery Network (“CDN”) that had been configured *only* to speed the
10 loading of the website in the United States and Asia. *See, Lee* at p. 17, 18 (“In this case, by
11 choosing to host ThisAV.com in Utah and to purchase CDN services for North America,
12 Defendants chose to have the site load faster for viewers in the United States and slower for
13 viewers in other places around the world. ... Defendants’ counterarguments are unavailing.
14 First, they object to two of Will Co.’s factual assertions. They object to Will Co.’s assertion that
15 the CDN they purchased only decreases latency in North America and Asia, arguing that it
16 actually decreases latency all around the world. However, at this stage, we resolve factual
17 disputes in favor of the plaintiff, so we must assume that the CDN Defendants purchased
18 decreased load times in North America and Asia only.”). Once again, no such allegation appears
19 in Plaintiff’s complaint in *this* case. *See* D.E. 9, Plaintiff’s Complaint. To the contrary, Ming
20 Chung’s Declaration makes clear that Defendants engaged Cloudflare from Hong Kong to
21 provide services for the website worldwide. *See* Declaration of Ming Chung, D.E. 23-3, p. 4,
22 ¶15 (“FSG uses Cloudflare’s services for Avgle.com’s worldwide use (the vast
23 majority of which is related to users outside of the United States).”)
24

1 Finally, the Ninth Circuit in *Lee* pointed to language contained on Defendants’
 2 website claiming that the website was available “from its location in the United States of
 3 America,” and that its use was warranted *only* within the United States, even though
 4 Defendants argued that the language was included by mistake, because, again, it resolved
 5 factual disputes in the Plaintiff’s favor. *See Lee* at 18, 19 (“Again, at this stage we
 6 resolve factual disputes in favor of the plaintiff, so for the purposes of resolving this
 7 motion, we must assume that Defendants intended to post the content that appears on the
 8 compliance pages, and thus that it is evidence of their subjective intent to target the U.S.
 9 market.”) Plaintiffs make no allegation of similar language appearing on Defendants’
 10 website in *this* case.

12 In short, the factors that led the Ninth Circuit to find the Defendants subject to personal
 13 jurisdiction in *Lee* – a decision that even the Ninth Circuit panel categorized as a “close call” are
 14 simply not present here. *This* case is not a close call and the Magistrate properly recommended
 15 the dismissal of the present action.

16 II. The Magistrate Properly Found That References to U.S. Law Contained In
 17 a Terms of Service Agreement Provided to Defendants By a Canadian
 18 Ad Broker Did Not Support a Finding of Personal Jurisdiction Over Defendants.

18 In his Report and Recommendation, the Magistrate held that references to U.S. law made
 19 by JuicyAds, a Canadian ad broker utilized by Defendants, in its Terms of Service Agreement
 20 did not establish personal jurisdiction over Defendants in the U.S.:

21 The Court has already determined Defendants’ reference to U.S. laws on its website was
 22 not sufficient to show express aiming. Dkt. 43 at 10-11. Plaintiff now seeks to draw a
 23 connection through a more opaque reference to U.S. laws in JuicyAds’ terms of service
 24 agreement. The terms of service agreement appears to be a boilerplate terms of service
 agreement used by JuicyAds with all publishers. See Dkt. 62 at 25-42. References to
 United States’ law in JuicyAds’ boilerplate terms of service agreement is not sufficient to
 show an effort by Defendants to target the U.S. market. It is more likely these statements
 were included because JuicyAds is aware that some publishers it works with would target

1 or have at least some U.S.- based traffic. *See AMA Multimedia*, 970 F.3d at 1212.
2 References to United States’ laws in JuicyAds’ terms of service agreement is not
sufficient to show Defendants’ intentional actions were expressly aimed at this forum.

3 Report and Recommendation, p. 8.

4 In response, Plaintiff (somewhat half-heartedly) argues that the magistrate erred because:
5 “Defendants, therefore, utilized an ad broker who was U.S. law compliant.” Objections, p. 3.
6 This is, of course, absurd. As the Magistrate noted, the Agreement itself was JuicyAds’
7 boilerplate language used with all of its publishers, no matter where in the world they might be
8 located. Moreover (as Defendants pointed out in their Supplemental Reply, the language on
9 which Plaintiff relied to make its arguments does not even appear in the *actual* agreements
10 between FSG and Tiger Media. Instead, Plaintiff pointed to language in the agreements that
11 purported to incorporate by reference Terms of Service that appear on the JuicyAds website and
12 which apply to both advertisers and publishers using the JuicyAds website. As the Magistrate
13 correctly concluded, the most that could said about the JuicyAds Terms of Service is that
14 *JuicyAds* (and not even Defendants) was aware that some of the websites for which it provides
15 services have at least some U.S. based traffic. This is far from enough to establish that
16 *Defendants* expressly aimed their Japanese-language website at the United States. *See, e.g.,*
17 *AMA Multimedia, Ltd. Liab. Co. v. Wanat*, 970 F.3d 1201, 1210 (9th Cir. 2020)(“Although
18 Wanat may have foreseen that ePorneer would attract a substantial number of viewers in the
19 United States, this alone does not support a finding of express aiming.”)

20 CONCLUSION

21 For the reasons stated hereinabove, this Court should adopt the Magistrate’s Report and
22 Recommendations in its entirety and finalize its order dismissing the present case for a lack of
23 personal jurisdiction.
24

1 **Respectfully submitted,**

2 /s/ Philip Mann

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17 *Attorneys for Defendants*

18 Dated: December September 23, 2022
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CERTIFICATE OF SERVICE

I hereby certify on September 23, 2022, I served the foregoing document on
counsel of record through the ECF filing system.

/s/ Evan Fray-Witzer